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No. 994

In the Supreme Court of the United States

OCTOBER TERM, 1969

SEYMOUR POLLACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1969. A petition for rehearing was denied on October 28, 1969. Mr. Justice Black extended the time for filing a petition for a writ of certiorari to December 27, 1969, and on December 24, 1969, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the multi-count indictment involving the fraudulent depletion of the assets of a life insurance company was unduly lengthy and erroneous in its joinder of counts.

2. Whether it was prejudicial error to admit evidence of the death of one alleged conspirator, the conviction of another who testified as a prosecution witness, and certain charts based on the evidence admitted at trial.

3. Whether the government illegally suppressed evidence concerning broker's records of bid and asked prices on the unlisted stocks which petitioner sold to the life insurance company.

4. Whether the newspaper coverage of the trial, which the jurors indicated they had not read, affected petitioner's trial.

5. Whether, on appeal, it was necessary for the court of appeals to hear oral argument before it rendered an opinion in petitioner's case.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Alabama, petitioner was convicted of conspiracy and of seven substantive counts involving mail fraud, fraudulent use of interstate wire communications, and interstate transportation of a stolen check obtained as a result of fraud, in violation of 18 U.S.C. 371, 1341, 1343, 2314, and 15 U.S.C. 77(q)(a). On April 17, 1969, he was sentenced to five years' imprisonment on each count, to be served concurrently.

The evidence showed that during the period between October 1965 and February 1966, the assets of the United Security Life Insurance Company of Birmingham, Alabama, were depleted by more than $639,000 (2 R. 646).[1] During this time, and for some time before, William DeLong was the operating head of United Security and one Keith was the general counsel of the company (1 R. 80–81). Petitioner was a New Jersey businessman who operated Transamerican Marketing Corporation as his corporate alter ego (2 R. 355, 439, 454, 486, 507, 587, 609). Named in the indictment as a fourth conspirator was J. Ernie Gaskin, the owner of a dormant life insurance company, Southern American Life Insurance Company, chartered in Arkansas (1 R. 1–25, 332–333, 2 R. 596–598).[2]

Beginning in 1963, the affairs of United Security had been under critical scrutiny by regulatory authorities (1 R. 147, 215, 231, 241–243, 2 R. 654, 657). DeLong would not allow corporate directors to examine the corporate books (1 R. 218). On August 26, 1965, DeLong was given the authority to sell stocks and bonds owned by United Security at prevailing market prices (1 R. 82, 218). Petitioner met DeLong (1 R. 86, 2 R. 523) shortly thereafter.

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[1] "R." preceded by the volume number refers to the three volume record of trial on file with the Clerk of this Court. The trial transcript is contained in volumes 1 and 2.

[2] DeLong committed suicide in March 1966 (1 R. 197). Petitioner's trial was severed from that of Keith and Gaskin, who were tried first. Keith was acquitted and Gaskin was convicted (1 R. 263, 280).

The depletion of the assets of United Security was accomplished by means of three transactions. The October 1965 transaction involved stock in two corporations, Fifth Avenue Industries and General Holding Corporation, which petitioner and Gaskin received as collateral for a $5,500 loan that Gaskin promised to make (1 R. 100, 263–277, 320, 2 R. 404). DeLong authorized his company to buy these securities from petitioner and Gaskin for $300,000. The stocks so purchased were unlisted, had little or no value (1 R. 48–54, 83, 101, 118, 155), and later efforts to sell them on the over the counter market were unsuccessful (1 R. 103, 190).[3] The second depletion transaction occurred in December 1965 when DeLong as president of United Security authorized his company to purchase 100,000 shares of Gaskin's life insurance company, Southern American Life (1 R. 55–58, 106–107). United Security Life paid $100,000 for this purchase of shares in a company which had little or no value and which could not be sold by United Security when an effort was later made to dispose of them (1 R. 59, 111).[4] During January and February

[3] While the transaction was described as a purchase, it was subject to petitioner's agreement to buy back the shares at a profit to United Security (1 R. 324). His corporate checks, issued by his Transamerican Marketing Corporation, in a purported later effort to buy back the securities, were dishonored on presentation (1 R. 59–63).

[4] The shares bought by United Security had been issued by Southern American Life to petitioner's corporation, Transamerican Marketing Corporation. Petitioner endorsed the stock certificates for Transamerican. The United Security check for $100,000 for the Southern American Life shares was deposited to the credit of Transamerican (1 R. 57, 107–109, 334).

1966 the third transaction occurred. It involved a planned sale of a portion of United Security's participating policies already in effect (1 R. 127). These policies were to be sold to Southern American Life, which was then headed by petitioner, instead of by Gaskin (2 R. 475, 543). In order to safeguard the interests of policyholders, a necessary step for such a sale (called reinsurance), was the transfer by the selling company to the reinsuring company of the reserves previously set aside to insure payment of the policies upon their maturity (1 R. 107, 120–121). As part of the planned agreement, United Security transferred to Southern American Life cash or listed securities having a total value of approximately $239,000 (1 R. 125, 133, 2 R. 540, 558, 571). The reinsurance agreement never was implemented (2 R. 503), but United Security never received the return of its cash or the listed securities which it had forwarded to Southern American Life Insurance Company (1. R. 120, 137).

Petitioner shared in the proceeds of both the October and December 1965 transactions (1 R. 256, 259, 329, 330, 342–348). He supervised the distribution of the $239,000 involved in the planned January-February 1966 reinsurance agreement and received a portion of this money for his own benefit (2 R. 557–571).

After DeLong's suicide in March 1966, United Security was found to be insolvent (1. R. 199). A director of that company then visited petitioner in Arkansas and sought to obtain reimbursement (1 R. 201). Petitioner explained his inability to reimburse

the company by stating that he had paid DeLong $40,000 of the money he had obtained from United Security, and that another part of the money had been used to pay some of Gaskin's debts (2 R. 204–206).[5]

At trial, there was no objection to the evidence that DeLong had committed suicide (1 R. 81, 197). Gaskin was called as a prosecution witness and testified that he had been found guilty at the earlier trial (1 R. 263). His other testimony concerned an October 1965 trip from Arkansas to New York where he met petitioner and one Papadakos, the owner of the shares of Fifth Avenue Industries and General Holding Corporation. He testified that he agreed to lend the owner $5,500 if the shares were pledged as collateral for the loan (1 R. 265–273) and that he thereafter received the stock in Arkansas (1 R. 273).[6]

As its final witness, the government presented the testimony of a certified public accountant who had spent some years investigating the affairs of United Security Life. This witness used three charts (Exhib-

[5] Gaskin had had previous difficulties with Arkansas insurance and securities authorities. In obtaining the money from United Security Life, the services of an Arkansas attorney, Carpenter, were used, with Carpenter serving as trustee. He deposited such money as petitioner and Gaskin gave him in his trustee's account in Arkansas. Carpenter thereafter made disbursements pursuant to petitioner's or Gaskin's directions, with some of the money being used to satisfy Gaskin's obligations arising from losses caused by stock issues of companies that Gaskin controlled. Carpenter also identified his trustee's check to DeLong in the amount of $40,000, which he stated he had issued pursuant to petitioner's instructions (1 R. 312, 342–348, 353, 2 R. 362–369).

[6] The subsequent transfer of these shares by petitioner and Gaskin from Arkansas to Alabama was the substantive offense alleged in Count 5 of the indictment (1 R. 96, 292).

its 162–164) to show the disposition which had been made of the United Security assets obtained by petitioner and Gaskin, the $300,000 in October 1965, the $100,000 in December 1965, and the $239,000 obtained in January–February 1966 (2 R. 630–636).

ARGUMENT

1. Despite petitioner's assertions, the indictment was not unduly lengthy. In the present case, there was a complex and continuing scheme which involved the ownership of shares of at least six corporations, the activities of four alleged conspirators, and multiple transfers of funds and securities among corporations and conspirators. The particularity of the indictment forestalled any request for a bill of particulars by the defense and served to make clear the ramifications of the charges which the prosecution hoped to prove.

Petitioner is mistaken when he states that the seven substantive offenses were "unrelated" to the conspiracy alleged in Count 1 (Pet. 10). On the contrary, each substantive offense was but one of many overt acts committed in furtherance of the conspiracy. All overt acts, whether charged as substantive offenses or not, were admissible as circumstantial evidence that the conspiracy existed. *United States* v. *Gosser,* 339 F. 2d 102, 110 (C.A. 6), certiorari denied, 382 U.S. 819; See *Pereira* v. *United States,* 347 U.S. 1, 12–13. The fact that petitioner did not know DeLong and Keith on August 26, 1965, when the conspiracy allegedly started with DeLong receiving from his board of directors authorization to sell assets, did not lessen

petitioner's culpability. A belated joiner of a conspiracy is equally liable with the one who originated the common scheme. *Blumenthal* v. *United States,* 332 U.S. 539, 557. Petitioner was an active member of the conspiracy when the substantive offenses occurred.

2. Petitioner's assertions regarding the admission of certain evidence relating to his co-conspirators are groundless. The indictment read that DeLong at the time of indictment was deceased (1 R. 1), and at trial evidence was admitted to the effect that DeLong had committed suicide. The fact that he had committed suicide was a neutral circumstance since the reason for his suicide (see Pet. 11) was not inquired into by either side. As for Gaskin, the government clearly had a right to call him as a government witness after he had been convicted at the earlier trial. The government made no effort to imply that petitioner was guilty by reason of Gaskin's prior conviction. Indeed, it was the government counsel who brought out that Gaskin was appealing his conviction (1 R. 264). The court twice instructed that Gaskin's conviction was not of any probative value in determining petitioner's innocence or guilt (1 R. 264, 2 R. 671). On the other hand, petitioner's counsel repeatedly noted that Keith had been acquitted at the earlier trial with Gaskin (2 R. 375, 396, 431). Under such circumstances it is clear that the jury in the present case could not have been swayed by the results of the Gaskin-Keith trial and that knowledge by the jury of Gaskin's conviction was not improper. See *Dobbins* v. *United States,* 408 F. 2d 973 (C.A. 5) No. 229, this Term, certiorari denied, 396 U.S. 829, 937; *United States* v. *Vida,* 370 F. 2d

759 (C.A. 6), certiorari denied, 387 U.S. 910; *United States* v. *Brill,* 350 F. 2d 171, 174 (C.A. 2), certiorari denied, *sub nom. Scalza* v. *United States,* 382 U.S. 973.[7]

3. It was proper to use the summaries in order to explain the other 161 exhibits which had been admitted into evidence. Such summaries were not inflammatory hearsay (cf. Pet. 5, 10) since the expert testified as to the evidentiary basis of the summaries or charts. At trial, the charts were objected to as being "repetitive" and "cumulative" (2 R. 632), indicating that petitioner's trial counsel did not regard the charts as other than summaries of what had previously been presented. Petitioner is similarly mistaken when he asserts that the exhibits relied upon in the preparation of the summaries were not sent into the jury room (Pet. 10). The trial transcript shows they were (2 R. 707). Summaries, based upon competent evidence already before a jury are admissible as a convenient and desirable aid to a jury's understanding of a long and complicated set of facts. *United States* v. *Rath,* 406 F. 2d 757 (C.A. 6), certiorari denied, 394 U.S. 920; *Swallow* v. *United States,* 307 F. 2d 81, 84 (C.A. 10), certiorari denied, 371 U.S. 950.[8]

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[7] None of the cases cited by the petitioner on this point (Pet. 11), are applicable to the present situation in which the co-defendant took the stand and testified against the defendant being tried.

[8] There was evidence to show that petitioner received $30,000 in cash (cf. Pet. 10). Carpenter, the attorney from Arkansas who served as trustee for petitioner and Gaskin, testified that one United Security Life check was exchanged for a banker's check in a lesser amount, with petitioner receiving the $30,000 residue in cash (1 R. 326).

4. There is no evidence that the government suppressed evidence of brokers' records of bid and asked prices on the unlisted stocks which petitioner and Gaskin sold to United Security Life in October and December 1965. Stockbrokers, as an aid in conducting their business, are furnished by financial service companies with "pink sheets", which contain the bid and and asked prices of unlisted securities (1 R. 101, 118, 168). The defense elicited information from a government witness that at one time one of the stocks sold to United Security Life by petitioner and Gaskin had a "pink sheet" bid price of $3 per share (1 R. 170–171). This value was disputed by the government, which presented evidence that the large quantities of shares acquired by United Security Life could not thereafter be sold (1 R. 103, 190).[9] Clearly, if petitioner believed that the "pink sheets" could have helped to establish value, he could have produced them or sought assistance from the government in obtaining them, since he knew of their existence and of their favorable implications.

5. During trial, the court repeatedly admonished the jurors not to read any newspaper accounts of the case (1 R. 37, 66, 119, 157, 211, 277, 336). Petitioner's counsel made several motions on the basis that a newspaper had reported the trial proceedings, that this paper was "available to members of the jury" (1 R. 213) and that such publicity was prejudicial (1 R. 337–338). The court replied that the article ap-

[9] Gaskin promised the owner of 150,000 shares a loan of $5,500 upon their being pledged (2 R. 270), thus giving them a value for collateral purposes of less than 4 cents a share.

peared to be an accurate account of the trial and that, in addition, he had instructed the jury not to read newspaper accounts (1 R. 338). After the last witness for the government had testified, the defense counsel reported that, during a recess, he had gone into the jury room and found there a newspaper containing an account of the trial. The bailiff averred that he had not seen such newspaper when he had previously checked the jury room (2 R. 659–660). The court questioned the jurors as to whether they had read newspaper accounts of the trial and none responded that they had done so (2 R. 662–663).

It was proper for the trial court to ascertain the lack of exposure by a collective inquiry addressed to the jurors. In view of the repeated admonitions to the jury not to read news accounts of the trial and their indication that they had refrained from doing so, it was not error for the trial court to deny the defense motions for mistrial. *Margoles* v. *United States,* 407 F. 2d 727 (C.A. 7), No. 289, this Term, certiorari denied, 396 U.S. 833, *Pearson* v. *United States,* 378 F. 2d 555 (C.A. 5).

6. The validity of Rule 18 of the Rules of the Court of Appeals for the Fifth Circuit (1968) permitting disposition of a case on briefs without oral argument is an issue raised in *Ambers* v. *United States,* No. 799, this Term, certiorari denied, January 19, 1970. For the reasons stated in our brief in opposition to the petition for a writ of certiorari in that case, the rule does not deprive an appellant of his right to due process or representation by counsel.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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